

1 David S. Markun (SBN 108067)
2 Mark A. Ozzello (SBN 116595)
3 Ari Y. Basser (SBN 272618)
4 **MARKUN ZUSMAN FRENIERE**
5 **& COMPTON LLP**
6 17383 Sunset Boulevard, Suite A-380
7 Pacific Palisades, California 90272
8 Telephone: (310) 454-5900
9 Facsimile: (310) 454-5970
10 dmarkun@mzclaw.com
11 mozzello@mzclaw.com
12 abasser@mzclaw.com

13 *[Additional Counsel on Signature Page]*

14 *Attorneys for Plaintiffs Laura Marks and*
15 *Gaylia Pickles, individually and on behalf*
16 *of all those similarly situated*

17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**

19 LAURA MARKS, GAYLIA PICKLES
20 & DONNA VANDIVER individually
21 and on behalf of all others similarly
22 situated

23 Plaintiffs,

24 v.

25 KATE SPADE AND COMPANY., a
26 Delaware corporation; and DOES 1-50,
27 inclusive,

28 Defendant.

Case No. 4:15-CV-05329-VC

**PLAINTIFFS' EX PARTE REQUEST
FOR MODIFICATION OF THE
BRIEFING SCHEDULE ON
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

1 Pursuant to Civil L-R. 7-10(b) and Paragraph 8 of Judge Vince Chhabria's
2 Standing Order for Civil Cases, Plaintiffs LAURA MARKS, GAYLIA PICKLES and
3 DONNA VANDIVER (collectively "Plaintiffs") respectfully submit this *ex parte*
4 request to modify the briefing schedule (Dkt. #71) on Plaintiffs' Motion for Class
5 Certification ("Motion"). Written notice of this *ex parte* application, and a courtesy
6 copy of same, was provided to Defendant's counsel on April 25, 2017.

7 This motion is brought on the grounds that: (1) Plaintiffs made a good faith
8 excusable mistake with respect to calendaring for the deadline to file their Motion; (2)
9 granting Plaintiffs' request to extend the time to file their Motion is in the best interests
10 of the putative classes; (3) Defendant will not suffer prejudice if the short amount of
11 time to file Plaintiffs' Motion is extended pursuant to Plaintiffs' proposed modification
12 of the briefing schedule; and, (4) granting Plaintiffs' an extension of time to file their
13 Motion will not affect the October 5, 2017, date set for the hearing on Plaintiffs'
14 Motion.

15 **I. STATEMENT OF THE CASE**

16 This case is a proposed class action brought by California and Texas Plaintiffs
17 against Kate Spade based on Plaintiffs' allegations that Kate Spade falsely advertising
18 former prices and corresponding price discounts for its Kate Spade Outlet Merchandise
19 ("Outlet Merchandise"). Plaintiffs allege that Defendant misrepresented the existence,
20 nature and amount of price discounts to consumers in its Outlet stores by purporting to
21 offer specific percentage discounts from expressly referenced former retail prices,
22 which were represented by Kate Spade as "our price" retail prices. Plaintiffs allege
23 that the "our price" retail prices did not represent prices at which the merchandise was
24 offered for sale and did not constitute the prevailing market retail prices for such
25 merchandise within the three months next immediately preceding the publication of the
26 advertisement.

1 By minute order filed on September 27, 2016, this Court set the briefing schedule
2 on Plaintiffs' Motion as follows: (1) Plaintiffs' Motion due by April 28, 2017; (2)
3 responses to the Motion due 90 days later by July 28, 2017; (3) reply to the Motion due
4 45 days later by September 11, 2017; and, (4) the Motion hearing date scheduled for
5 October 5, 2017. *See* Dkt. 61. The minute order also informed that there would be *no*
6 *continuance of the Motion hearing date*, however, was silent as to whether the schedule
7 for filing briefs in support of and in opposition to the Motion could be modified. *Id.*

8 Plaintiffs propounded a Request for Production of Documents, Set One, to
9 Defendant Kate Spade & Company on September 27, 2016. Basser Decl. at ¶ 5.
10 Defendant did not respond to Plaintiffs' Request for Production of documents until
11 December 13, 2016, and claimed that it would not produce documents in response to
12 many of those requests until entry of an appropriate protective order. Basser Decl. at ¶
13 5. The Parties met and conferred regarding the drafting of an appropriate protective
14 order for several months until one was entered by the Court on February 8, 2017, and
15 Defendant did not supplement its production until February 27, 2017. Basser Decl.
16 at ¶ 6. Further, Defendant never completed its production. Basser Decl. at ¶ 6.

17 An associate of the firm had the responsibility for maintaining the case file and
18 making members of the firm aware of deadlines. Basser Decl. at ¶ 7. Although that
19 associate was aware that the Parties had proposed various dates for briefing on
20 Plaintiffs' Motion through the filing of a Joint Status Conference Statement (Dkt. 70),
21 the associate was unaware of the exact date that had been set in a Minute Order that he
22 did not see, and operated under the assumption, for many months, that no deadline was
23 imminent. Basser Decl. at ¶ 7. On April 24, 2017, after being asked by partners at the
24 firm what the deadline for filing Plaintiffs' Motion was, the associate of the firm
25 checked the Court's ECF system and saw that the Court had set the deadline for April
26 28, 2017. Basser Decl. at ¶ 7. Upon learning of the April 28, 2017, deadline for filing
27 Plaintiffs' Motion, the associate assumed that the deadline had never been calendared,
28

1 as he had never seen any notifications of the date. Basser Decl. at ¶ 8. The associate
2 then informed Defendant's counsel of what he thought was a calendaring mistake and
3 requested a 60-day extension of all pending briefing deadlines in conjunction with
4 Plaintiffs' Motion. Basser Decl. at ¶ 8; *also see* a true and correct copy of April 24,
5 2017, correspondence from Ari Y. Basser, Esq. to Defendant's counsel attached hereto
6 as "Exhibit A." Defendant's counsel did not respond to Plaintiffs' April 24, 2017,
7 correspondence. After the e-mail was sent, another attorney at the firm informed the
8 associate that it appeared that a deadline had been calendared, however the associate
9 had not seen any reminders for it. Basser Decl. at ¶ 9.

10 On April 24, 2017, at approximately 3:00 PM PST, Plaintiffs' counsel
11 telephoned Defendant's counsel to discuss granting Plaintiffs' additional time to file
12 their Motion and modification of the briefing schedule on Plaintiffs' Motion. Basser
13 Decl. at ¶ 10. Defendant's counsel communicated its belief that the Court would not
14 permit a continuance of the class certification hearing date and declined to agree to
15 move the hearing. Basser Decl. at ¶ 10. On April 24, 2017, at approximately 5:00 PM
16 PST, Plaintiffs' counsel telephoned Defendant's counsel again and expressed its
17 agreement that moving the hearing date for Plaintiffs' Motion would neither be
18 necessary or appropriate in light of the Court's Minute Order. Basser Decl. at ¶ 11.
19 Plaintiffs' counsel also offered a proposal for amending the briefing schedule that
20 would allow the Court to keep the October 5, 2017, date for hearing Plaintiffs' Motion
21 – contingent with the Court's wishes. Basser Decl. at ¶ 11. Namely, Plaintiffs' counsel
22 proposed that, in exchange for a 30-day extension of time to file Plaintiffs' Motion,
23 Plaintiffs' time to formulate a Reply brief would be shortened by approximately 30
24 days (leaving Plaintiffs' approximately 2 weeks instead of 45 days to draft a
25 reply). Basser Decl. at ¶ 11.

26 Plaintiffs' counsel further informed Defendant's counsel that the proposed
27 amendment to the briefing schedule would not impact Defendant's 90-day timeframe
28

1 in which to formulate its Opposition. Basser Decl. at ¶ 10. During the call,
2 Defendant's counsel informed Plaintiff's counsel that it would attempt to advise
3 Plaintiffs in the morning on April 25, 2017, if it would stipulate to a new briefing
4 schedule. Basser Decl. at ¶ 11.

5 On April 25, 2017, at approximately 8:26 AM PST, Plaintiffs' counsel sent
6 correspondence to Defendant's counsel memorializing its proposal to modify the
7 briefing schedule on Plaintiff's Motion¹ and requesting Defendant's stipulation to an
8 amended briefing schedule so that Plaintiffs' could avoid having to file *ex parte* papers
9 to bring the matter to the Court's attention. Basser Decl. at ¶ 12; *also see* April 25,
10 2017, correspondence from Ari Y. Basser, Esq. to Defendant's counsel attached to the
11 Basser Decl. as "Exhibit B." On April 25, 2017, at approximately 10:40 AM PST,
12 Defendant's counsel confirmed via e-mail that it would not agree to the requested
13 modification of the briefing schedule. Basser Decl. at ¶ 13.

14 On April 25, 2017, at approximately 3:45 PM PST, Plaintiffs' counsel informed
15 Defendant's counsel in writing that it would file the instant *ex parte* application to
16 modify the briefing schedule on Plaintiffs' Motion. Basser Decl. at ¶ 14; *also see* April
17 25, 2017, correspondence from Ari Y. Basser, Esq. to Defendant's counsel attached to
18 the Basser Decl. as "Exhibit C."

19 **II. DISCUSSION**

20 Federal Rule of Civil Procedure 6(b)(1) authorizes the Court, within its
21 discretion and for cause shown, to extend the time allowed for filing a document. *See*
22 Fed. R. Civ. P. 6(b)(1).² This rule, like all the Federal Rules of Civil Procedure, "[is] to
23 be liberally construed to effectuate the general purpose of seeing that cases are tried on

24 _____
25 ¹ Plaintiffs' counsel proposed the following briefing schedule: Certification hearing: October 5,
26 2017; Plaintiffs' Motion deadline: May 26, 2017; Defendant's Opposition deadline: August 24, 2017
(90 days after MFCC deadline); Plaintiffs' Reply deadline: September 8, 2017 (15 days after
Opposition filing). *See* "Exhibit B" attached to the Basser Decl.

27 ² Civil Local Rule 7-10(b) further allows for filing of this motion *ex parte*. Plaintiffs' counsel
28 attempted to obtain a stipulation for an extension and modification of the briefing schedule from
Defendant's counsel, but Defendant's counsel would not agree. *See* Basser Decl. at ¶ 12.

1 the merits.” *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir.1983) (quoting *Staren v.*
2 *American Nat'l Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir.1976));
3 *see also* Fed.R.Civ.P. 1 (“[The Federal Rules] should be construed and administered to
4 secure the just, speedy, and inexpensive determination of every action and
5 proceeding.”). Consequently, requests for extensions of time made before the
6 applicable deadline has passed should “normally be granted in the absence of bad faith
7 or prejudice to the adverse party.” 4B Charles Alan Wright & Arthur R. Miller, *Federal*
8 *Practice and Procedure* § 1165 (3d ed.2004). “Good cause” is a non-rigorous standard
9 that has been construed broadly across procedural and statutory contexts. *See, e.g.,*
10 *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 187 (1st Cir.2004); *Thomas v.*
11 *Brennan*, 961 F.2d 612, 619 (7th Cir.1992); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d
12 951, 954 (4th Cir.1987).

13 To determine whether a party's inability to meet a deadline constitutes
14 “excusable neglect,” courts must apply a four-factor equitable test, examining: (1) the
15 danger of prejudice to the opposing party; (2) the length of the delay and its potential
16 impact on the proceedings; (3) the reason for the delay; and (4) whether the movant
17 acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship.*, 507 U.S.
18 380, 395 (1993); *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir.1997)
19 (adopting this test for consideration of Rule 60(b) motions).

20 Plaintiffs’ unawareness that the deadline for filing the Motion was so imminently
21 pending was inadvertent and certainly not intentional and Plaintiffs ask for the
22 requested relief. Granting Plaintiffs their requested 30-day extension of time in which
23 to file their Motion, while leaving the hearing date for Plaintiffs’ Motion and the
24 amount of time in which Defendant has to frame its Opposition unaltered, will permit
25 this case to be tried on its merits and will not materially affect the proceedings or
26 prejudice the Defendant.

27 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5

6

7

8

9

10

11

12

13

14

15

16

17
18
19
20
21
22

23
24

25